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FCC's 'Permission-Denied' Policy for Video Devices Is Wrong

by

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The Federal Communications Commission (FCC) is proposing new regulations to mandate a uniform technical design for set-top TV boxes – the device you probably refer to as the VCR. The problem is that nobody uses VCRs anymore. The agency wants to press the rewind button by resurrecting its 1990s analog-era cable set-top box rules and superimposing them on today's vibrant digital video device market.

Having the government design digital video devices is folly. The government-prescribed technical mandates would substitute bureaucratic preferences for the freedom to innovate. Regulation would largely displace arms-length negotiated agreements among manufacturers, content owners and video service providers over security and intellectual property rights.

What's more, the government mandates contemplated by the FCC likely violate the First Amendment by displacing the video service providers' editorial judgments regarding video menus and the arrangement of related content displays. The FCC would require video service providers to disaggregate video displays and menu products into prescribed outputs for third parties to reassemble and rebrand. This infringes upon the free speech rights of the video service providers.

The current array of consumer choice among cable, direct broadcast satellite (DBS), and telephone companies for video services renders farfetched any anti-competitive claims as justification for new device regulations. The case for marketplace freedom is cemented by the availability of separate, alternative platforms offered by new online video distributors (OVDs) and digital streaming media services and devices.

Video devices, including the various existing set-top boxes offered by cable, satellite and telephone companies, are meticulously designed with various navigation, connectivity and security tradeoffs in mind. Video content owners, video device manufacturers and video service providers balance technology constraints, protection of intellectual property rights, and financial considerations in designing and manufacturing video devices. These market participants, with their institutional knowledge, technical expertise and financial stakes, are best positioned to continue innovations in the video device segment.

FCC Chairman Tom Wheeler has made "permissionless innovation" an agency mantra. But mandating uniform technical standards is the opposite of permissionless innovation; it's a permission-denied policy. New government-prescribed device mandates would dismantle the interdependent technologies and business arrangements that are propelling marketplace innovation.

Existing market conditions do not justify the FCC's proposed device controls. Video device regulations already on the books are embarrassingly outdated. They were adopted when cable operators had 90 percent of the subscribers to multichannel programming distributor (MVPD) services. When the FCC first unveiled its set-top box rules nearly 20 years ago, the market was characterized by analog televisions and VCRs.

Now, cable, satellite and telephone companies compete for multichannel video subscribers. By the end of 2013, cable's market share had fallen below 54 percent. Satellite providers accounted for 34 percent of subscribers, with 11 percent served by telephone companies. The nation's largest traditional video provider is now AT&T-DIRECTV, not a cable operator. More than 99 percent of U.S. households had access to at least three competing traditional multichannel providers, while 35 percent had access to at least four. Analog has been replaced by digital video services in high-definition (HD) – and now ultra HD – along with two-way functionality such as video-on-demand, TVEverywhere and HD digital video recorders (DVRs). The variety of video content has also grown tremendously since the 1990s.

Just as significant, and perhaps more so, online video distributors relying on broadband connections offer consumers alternative vertically integrated platforms for accessing video programming, and not just on TV sets, but through various mobile devices, gaming consoles, PCs or media-streaming devices. Netflix and Amazon Prime now have over 100 million subscriptions – equal to, or greater than, the number of traditional subscriptions. Almost 20 percent of U.S. broadband households now have a streaming media device – whether the Roku 3, Amazon Fire TV or Apple TV – and the number is growing rapidly. Meanwhile, 8 percent of those households have stick devices for streaming media to TVs or PCs, like the Google Chromecast or the Amazon Fire TV Stick. An estimated 86 million streaming media devices will be sold globally by 2019.

In the Telecommunications Act of 1996, Congress included a unique provision authorizing the FCC to "sunset" video device regulations when competitive conditions warrant. Instead of availing itself of that authority now that the video marketplace is undeniably competitive, the FCC wants to step backward in time. It wants to establish a "permission-denied" regime in order to avoid relinquishing control.

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